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Supreme Court of the United States

OCTOBER TERM, 1941

No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE BANKRUPT ESTATE OF LAKE NURSERY COMPANY, A BANKRUPT, *Petitioners,*

VS.

L. MAXCY, INC., A FLORIDA CORPORATION.

BRIEF OF RESPONDENT, L. MAXCY, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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KEY TO ABBREVIATIONS

(R.) means the *incomplete Record* filed with the pending application for certiorari.

(F. R.) means the Records filed with former applications, *which are essential to an understanding of the case.*

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The Trustee in Bankruptcy of the Lake Nursery Company seeks a review by certiorari of the judgment of the Circuit Court of Appeals of the Fifth Circuit handed down May 2, 1941 (*L. Maxcy, Inc., vs. Walker,* 119 Fed. (2d) 535), reversing a judgment of the District Court for the Southern District of Florida, which assessed a mortgagee who purchased property at a sale by the Trustee free of liens $5,500 as a contribution toward the cost of the sale.

For brevity we shall refer to the parties involved herein as follows: "Trustee" means C. D. Walker, as Trustee in Bankruptcy, the petitioner in this cause; "Maxcy" means L. Maxcy, Inc., a Florida corporation, the respondent herein.

A CONCISE STATEMENT OF THE CASE

Trustee's counsel in their brief refer to and adopt as their "statement of the case" the "summary statement of the matter involved" in their petition for writ of certiorari. This statement is deficient and misleading in several important respects:

It makes prominent at the outset the claim of the Trustee for ". . . the costs of preservation" of the property involved and the argument stresses the right of the Trustee to recover therefor, but fails to state that this claim went out of the case on April 22d, 1940, when the District Judge struck it from the Referee's order of allowance by his "memorandum" (R. 108) and by his order of that date (R. 107) from which no appeal was taken by either side. It was from the judgment of August 20, 1940, entered upon review of the Referee's subsequent order that the case was carried to the Circuit Court of Appeals (R. 122-123).

The next important omission is that District Judge Akerman was out of Florida at his summer home in North Carolina continuously from the date the petition for review was filed until he came to Jacksonville and heard arguments on August 5, 1940, and, under the prevailing practice in the District, other judges thereof would not have heard the petition for review, since it related to a complicated matter which only Judge Akerman had handled and which was pending in the Orlando Division, over which he presided (R. 120-121). Hence, it was impossible to have called the petition for review up for hearing within

twenty days from the filing of the certificate of review by the Referee.

It is next stated that the District Judge ". . . entered an order granting the said motion to dismiss." An examination of Judge Akerman's opinion and order (R. 122-123) shows, on the contrary, that *the Judge considered and affirmed the Referee's order upon its merits* and that he did not dismiss the petition for review.

It should have been stated also that the property did not sell for enough to pay the lien held by Maxcy; that the Bankrupt had no other asset; and, that the only income of the Trustee was the proceeds of fruit from the encumbered property, from which he had received during his three years of possession $15,-820.08 (R. 36), out of which he had expended upon the property a total of only $9,776, consisting of the following items: Fertilizers $5,737.32, Wages $1,-305.50, Spraying materials $1,969.09, Cultivation $733.42, Repairs to house $30.67 (R. 36-38). The balance of the income, less $78.90 which the Trustee had on hand at the time of making his report, had been expended, together with certain sums borrowed, in unsuccessfully contesting Maxcy's lien. (See the opinion of Judge Akerman, R. 108, and the opinions of the Circuit Court of Appeals cited on page five hereof.)

It is also stated that Maxcy moved the Court to confirm the sale of the property to it, etc., and again that Maxcy availed itself of the sale free of liens so made by the Trustee. The important fact should

have been added that the sale so made by the Trustee was ". . . over the protest of . . . L. Maxcy, Inc., which Company held a mortgage on the property of $61,685.24." (See opinion of Judge Foster, 119 Fed. (2d) 535.)

DIMINUTION OF RECORD

Maxcy's opposition to the sale is not truly reflected by the partial record filed in this Court with the petition on July 12, 1941. On page 124 of that record will be found a stipulation by counsel for the respective parties in the Circuit Court of Appeals to the effect that the printed records in two former appeals to that Court, to-wit, Volumes I, II and III in case number 8414, and Volume IV in cause number 9003, "may be considered as a part of the record in this appeal if, and as far as, pertinent and applicable to any issue involved in this cause." That stipulation was observed by the Circuit Court of Appeals. Those records were brought to this Court in two former applications for writs of certiorari, and unless this Court now considers them, the record is too meager for intelligent action. Therefore, in this brief we shall be obliged to cite said other records and since the pages therein are numbered consecutively in the four volumes, we shall use only designation "F. R.," which means former record.

ARGUMENT

We perceive no ground upon which this Court should grant certiorari. Certainly the case does not

fall within the category specified in Rule 38 of this Court.

For brevity we shall follow and answer *seriatim* the argument, pages 16-29 of the Trustee's brief, which lists and argues grounds "A" to "F," inclusive.

"A. May a party litigant ignore a local rule of the District Court which provides that all petitions for review of a Referee's order in Bankruptcy shall be called up by the petitioner for hearing before the Judge within twenty (20) days from the filing of the certificate of review by the Referee," etc.

This case has been to the Circuit Court of Appeals twice (*Florida Fruit Canneries, Inc., vs. C. D. Walker, as Trustee*, 90 F. (2d) 753; *C. D. Walker, as Trustee, vs. L. Maxcy, Inc.*, 103 F. (2d) 24), and from each decision of that Court in favor of Maxcy, certiorari was unsuccessfully sought of this Court. The particular phase of the case then involved, to-wit, what amount Maxcy should contribute toward paying the expenses of the sale in bankruptcy free of liens, had been previously reviewed by District Judge Akerman, who had remanded the cause to the Referee with directions (R. 107-108), and Judge Akerman was absent from the State of Florida at his summer home in North Carolina continuously from before the petition for review was filed until after the Trustee moved to dismiss the case. Hence, it could not be called up before Judge Akerman and would not be considered by any other judge of the District (R. 120). Moreover, when Judge Akerman returned to the District, he passed upon the merits

of the Referee's order and did not dismiss the petition for a review of said order (R. 122), and, the Circuit Court of Appeals reviewed the decree of Judge Akerman upon the merits of the case (119 F. (2d) 535), notwithstanding all which this Court is asked to say that under District Court Rule 22 it was the imperative duty of the District Judge to have dismissed the case and of the Circuit Court of Appeals to have treated it as dismissed.

This Court in *United States vs. Gotlieb Breitling,* 20 Howard 252-255, 15 L. Ed. 900, said:

> *"And it is always in the power of the Court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice require it."*

Of course, a contrary rule has often been expressed with respect to rules prescribed by superior courts for the government of inferior courts, but a court may waive its own rule, and should do so, when justice requires it, and the Circuit Court of Appeals promptly so ruled from the Bench when opposing counsel made the argument there that it now urges before this Court. Furthermore, the rule did not apply when the Judge was out of the State, because it was impossible to call the case up for hearing. (*In re Hopkins,* 15 F. (2d) 206.)

The cases cited in the Trustee's brief are not in point and do not sustain his contention. That of *Williamson vs. Leith, et al.,* (C.C.A. 5) 36 F. (2d) 643 involved an entirely different situation. The petition for review in that case was not called up for more

than a year, and in the meantime the Trustee, assuming that the petition had been abandoned, had disposed of the property. The Appellate Court held that he was justified in so doing and that it was error for the District Court under the circumstances to have made an order affecting the property without determining if the Trustee still had it in his custody. The opinion expressly concedes that the District Court had power to waive its rule. Each of the other cases cited involved the requirement that the petition for review must be filed within ten days from the date of the Referee's order. In none of the cited cases did the District Court waive its rule, but in numerous other cases that rule has been waived even after the time had expired. See *Thummess vs. Von Hoffman* (C.C.A. 3) 109 F. (2d) 291, and numerous cases cited therein. Moreover, being an administrative order, the District Court had the power to review it *sua sponte* at any time before settlement of the Trustee's accounts. *In re Stillwell, et al.* (C.C.A. 6) 12 F. (2d) 205.

"B. Where a lienholder avails itself of the benefits of a sale free and clear of liens . . . should the lienholder be required to pay the reasonable costs of the proceedings had for the sale," etc.

We have mentioned that Maxcy opposed the sale. The opinion of the Circuit Court of Appeals points out the same fact, saying that the sale was made ". . . over the protest of appellant, L. Maxcy, Inc." Maxcy's opposition is made to appear over and over again in the record. Its answer to the petition of the Trustee for leave to sell averred that the property

contained no equity for the unsecured creditors, and said:

> ". . . and that in truth and in fact the property cannot be sold for an amount sufficient to pay even the debt due this respondent. However, if this Honorable Court does find that there is equity in favor of the Creditors, and that the property should be sold, then that this respondent should be protected against any costs to be taxed in this cause; and that the costs of the said sale and all matters incident thereto should be paid by the Trustee in Bankruptcy, and not taken from the proceeds of any sale, unless the property should sell for sufficient to satisfy respondent's claim." (F. R. 9003, pp. 1298-9.)

The answer prays:

> "That in the event this Honorable Court shall find that there is no equity in the property in favor of the creditors, that the Trustee in Bankruptcy turn over and deliver the same to this respondent, and require the Trustee to account for any moneys which may have come into his hands." (F. R. 9003, p. 1300.)

Passing upon similar pleadings, the Court *in re Bruce Sewing Machine Company,* 2 F. Supp. 330, said:

> "Respondent answered. It asserted its rights in the premises and at the conclusion consented to the sale by the trustee, upon condition, if the real estate shall not bring a sum in excess of defendant's debt, interest, and costs, 'this defendant be permitted to purchase said real estate at said sale for the amount of

> said debt, interest and costs, surrendering its lien in payment of the purchase price.' In effect, the bank said, it did not believe the trustee in bankruptcy had any interest in the property, but, if he thought he could get something out of it over and above what was due the bank, the interest and costs, he was at liberty to do so at his own hazard. It stood squarely upon its legal rights within the provisions of section 67d of the Bankruptcy Act and assumed no additional obligation."

Even before, namely, in its answer to the plenary suit brought against it by the Trustee, it sought leave to foreclose its mortgage in the State Court, but was denied that privilege by order of the District Court (F. R. 179-184, Par. 9).

The petition of the Trustee for leave to sell free of liens was filed on the 16th of December, 1937 (F. R. 1281). In that petition he says:

> "He is desirous of immediately disposing of all property of the bankrupt corporation and in order to do so most advantageously in the interest of the creditors of said bankrupt, both secured and unsecured, does verily believe that all property should be sold free and clear of all liens, judgments and mortgages."

This petition was granted by order of the Referee dated February 24, 1938, but the Trustee delayed selling, and on May 12, 1939, Maxcy filed a petition with the Referee setting forth the delay and the facts in reference thereto (R. 24-28) and other facts showing how Maxcy was being injured, and concluded by calling attention of the Court to the fact that Maxcy

had opposed the sale throughout, but since the Court had ordered that the property be sold free of liens, Maxcy prayed that the sale be promptly made so as to save it further and continuous injury resulting from the delay. Maxcy's position was that of a condemned man who prayed for speedy execution of the sentence inasmuch as there was no escape. He no more consented to the sale than the supposed prisoner consented under such circumstances to his own execution. This fact makes a vast difference, because under the law if a lien holder invites the sale of his property by a Court of Bankruptcy free of liens, he may be charged with costs, even though there is no general estate out of which the costs can be paid, but the contrary is true where the sale is made over the lien holder's protest and the property does not bring enough to pay the lien, because Section 68, Sub-section d of the Bankruptcy Act, 11 U.S.C.A., Section 107, Sub-section d, expressly provides that

> "Liens given or accepted in good faith . . . shall . . . not be affected" by bankruptcy.
>
> "It was the purpose of Congress in enacting a national insolvency law to preserve, rather than destroy, any of the rights or advantages enjoyed by creditors under the laws of the states, save to the extent that they are repugnant to or inconsistent with the specific provision of the bankruptcy law." *Schexnailder v. Fontenot, et al.*, 85 So. 207.
>
> "All obligations of legal and equitable nature, except those expressly affected by terms of bankruptcy act, remain undisturbed by bankruptcy." *Wilson et al. v. Duncan,* C.C.A. 5, 61 Fed (2) 515.

It seems obvious that to take a large sum of money from a lien holder under the guise of charging him with the cost of selling the property free of lien deprives him of his security as effectively as if the taking had assumed any other form. In each of the cases cited by the Trustee the creditor had invoked, or agreed to, the sale of the property upon which he had a lien, and, hence, they do not apply in this case, where the sale was opposed by the lien holder.

"C." Under this heading it is contended that the Trustee and Referee were entitled in any event to be paid their statutory fees out of the proceeds of the property. The first and main case cited and relied upon by counsel (*In re: Huggins Co.,* 179 Fed. 490—should be *In re: Harralson*) holds exactly to the contrary. The second and only other case cited (*Varney v. Harlow,* C.C.A. 4, 210 Fed. 824) did not involve the question before this Court. In that case the bondholders not only consented to the sale by the Trustee free of lien, but petitioned that it be made, and the Court found that the decree of sale was drafted to meet the bondholders' convenience. Hence, the real question there decided was whether the Trustee was entitled to a commission from the purchase money on the amount constructively disbursed by him to the lien holder.

Of course, the Trustee and Referee are entitled to their commissions if there is a general fund out of which they can be paid, but they are not so entitled when the only asset is encumbered, and it, when sold against the will and over the protest of the lien holder, fails to bring enough to pay the lien. Any other rule

would not only violate the statute (Bankruptcy Act, Section 67, Sub-section d, 11 U.S.C.A., Section 107, Sub-section d), but would tempt officers to sell encumbered properties when there was no reasonable prospect of thereby producing a surplus for the benefit of the bankrupt estate.

In *Louisville Joint Stock Land Bank vs. Radford,* 295 U.S. 555, 55 S. Ct. 854, this Court said:

> "Sale free of liens will not be ordered by bankruptcy court if it appears that amount of incumbrance exceeds value of property to be sold; and in case of sale free of liens for less than amount of lien, bankrupt estate must bear costs of sale."

Where there are no other assets and the property does not bring enough to pay the lien and the sale was not made for the benefit of the encumbered property or at the request of the lien holder, the rule is that such expenses of the sale as would not exceed the cost to foreclose in the State Court are chargeable against the proceeds. In addition to the cases heretofore cited see *Robinson vs. Dickey,* C.C.A. 3, 36 Fed. (2) 147; *Aetna Life Insurance Co. vs. Leonard, et al.,* 186 Fed. 148; *Seaboard National Bank vs. Rogers Milk Products Co., et al.,* C.C.A. 2, 21 Fed. (2) 414; *In re: West,* 232 Fed. 903; *In re: Ford's Wawbeek Springs, Inc.,* 7 Fed. (2) 959. And as pointed out by the Circuit Court of Appeals in the case now sought to be reviewed, such taxable cost "does not include hypothetical attorneys' fees where there has been no foreclosure, nor does it include the Referee's commission or the Trustee's compensation

measured by the amount the property may bring." (119 Fed. (2) 536, Column 1.) On the contrary, the amount assessable cannot exceed the statutory fees allowed in the particular state for officers conducting a sale under state foreclosure proceedings, and no attorney's fee can be allowed because there was, in fact, no foreclosure and such fee would be wholly hypothetical.

"D." Under this heading the brief discusses the amount allowable under the Bankruptcy Act to Trustees and Referees, but we have shown that the allowances provided by the Bankruptcy Act are not applicable under the facts of this case.

"E." Under this heading it is contended that Maxcy ought to have been required to contribute toward "the costs and expenses incident to the preservation and liquidation of the security involved."

District Judge Akerman answered that contention in his "Memorandum" of April 22, 1940, in the following language:

> ". . . nor do I have any doubt that in a proper case the property covered by the lien should be charged with the expenses of preserving the property. However, it appears from the Trustee's report that while this property was in the hands of the Trustee large sums of money were obtained from the sale of the fruit produced thereon, which sums of money were very largely expended in the payment of attorneys' fees and expenses of costly and unsuccessful litigation between the Trustee and L. Maxcy, Inc., and I do not think it is consistent with the

> prinicipies of equity to expend the income derived from property in the hands of the Trustee in unsuccessfully fighting the holder of a lien, and then undertake to charge the holder of such lien with the expenses of preserving the property." (R. 109)

The order of the Court remanded the cause to the Referee "for further proceedings in accordance with the views expressed in said opinion." (R. 107-8.) No appeal was taken from that order, and the Referee in his next finding, in obedience to the order, reduced the sum which he had commanded Maxcy to pay from $8,953.00 to $5,500.00 (R. 113). It was from the decree of Judge Akerman (R. 122) affirming the second order of the Referee that the appeal was taken to the Circuit Court of Appeals, whose opinion this Court is now asked to review. Hence, question of assessing Maxcy a sum for the preservation of the property was not before the Circuit Court of Appeals and is not before this Court. Moreover, any such charge would have been manifestly inequitable for the reasons pointed out by Judge Akerman.

"F." It is next argued that $5,500.00 was a reasonable amount "to require the security holder to pay where the property involved consists of a citrus grove which required constant care and expense for its preservation," etc. What we have said under the previous heading "E" is a complete answer to this claim. Moreover, the Trustee's report, as we have pointed out, shows that he took several thousand dollars more from the property than he expended upon it; that he kept the property from Maxcy for three years without offering it for sale, and finally it sold

for many thousand dollars less than the amount of the encumbrances Maxcy had. The fault lies at the door of the Trustee and Referee. The Court *In re: West,* 232 Fed. 903 pertinently points out that in a case where the bankrupt's property was sold by the Trustee free of lien "solely with the view of realizing for the general creditors and not for the benefit of the lien holder," there is no reason why the expense of the sale should be charged to the lien holders if they did not consent thereto. The same view was expressed in *In re: Ford's Wawbeek Springs, Inc.,* 7 Fed. (2) 959, where the Court speaking of the Trustee's claim for compensation said:

> "In other words, having incurred expenses in the hope of realizing something for creditors, and having failed in his endeavors, he now suggests that a secured creditor pay these expenses out of his security . . . moreover, it is clear, from facts that were before the Referee in the bankruptcy proceeding, that the activities of the Trustee were prompted more by the hope of invalidating the security of the mortgage than by any hope or expectation of realizing any surplus for creditors over and above the mortgage. In this attempt the Trustee was not successful."

So the Court denied him and his counsel compensation. The situation there described fits the case at Bar.

One other point we would urge is, that the claim for attorney's fees cannot be allowed as costs, as costs have never been held to embrace attorney's fees.

In this case there was no foreclosure, but counsel took the position that they could force a sale of the property and recover attorney's fees commensurate with foreclosure proceedings. There is no rule that would authorize such procedure.

Another case we would call especial attention to is *Virginia Securities Corporation vs. Partick Orchards, Inc.,* 20 Fed. (2nd) 78, (C.C.A. 4th Cir.). It is the suggestion of counsel that the present is in conflict with other decisions of the Circuit Courts of Appeal on the question, and that case is cited to sustain it.

Again, we call attention to the fact that in that case the mortgage creditor voluntarily chose to avail himself of the administrative functions of the Court in Bankruptcy to realize on his security.

The rule is summed up in the 5th headnote as follows:

> "Where there was no general fund in bankrupt estate, and expense of foreclosure and administration was incurred wholly for benefit and advantage of mortgaged property, such expenditure was properly chargeable against it, particularly where mortgage or lien creditor voluntarily sought to avail himself of administrative functions of court to realize on his security."

As already pointed out, Maxcy did not seek the aid of the Court, but protested the sale by the Trustee at every step, and to argue that because he requested the Court to enforce the order to sell the

property made February 24, 1938, so as to get the property away from the Trustee, who had practically abandoned it (F. R. 26), is an effort to avail itself of the administrative function of the Court in bankruptcy to realize on its security, is not short of begging the question.

Nor is the contention of counsel that because a motion was filed to confirm the sale waived the prior objections entitled to consideration. The property had been sold, but was still in the hands of the Trustee, who was neglecting it, and there was nothing left but for Maxcy to ask the Court to confirm that sale, so that it could get possession of the property to prevent a total loss.

CONCLUSION

We respectfully submit that the nature of this case precludes the review thereof by this Court and that the decision of the Circuit Court of Appeals is manifestly in accord with the statute and with the equities of the case, wherefore the petition for writ of certiorari ought to be denied.

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